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Sovereign Ownership of Private Property in the Name of Preservation: A Contradiction in Terms and of the Constitution

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SOVEREIGN OWNERSHIP OF PRIVATE PROPERTY IN THE NAME OF PRESERVATION: A CONTRADICTION IN TERMS AND OF THE CONSTITUTION

I. INTRODUCTION

While metal detecting in his back yard in Demopolis, Alabama, Eric Sherman found a gold watch from the Civil War era.[1] Excited about the find, Eric showed the gold watch to some of his friends and neighbors. A week later, the police knocked on his door, arrested Eric and confiscated the watch. Eric had violated an Alabama statute that grants the state ownership over any items of historical significance found embedded in the ground.[2]

This Note examines section 41-3-1 of Alabama's Antiquity Act ("AAA"),[3] which bestows ownership rights to the state over objects found on private property.[4] This Note departs from the present trend in archaeological preservation law commentary[5] and argues that, al-

1. Although this is a fictitious hypothetical, the Alabama Antiquity Act ("AAA") was enforced in *In Re* Southern Natural Gas Co., 85 Fed. Energy Reg. Comm'n Rep. (CCH) P 61, 135, 1998 W.L. 758062 at *53-4. *See infra* text accompanying notes 179-84.

2. ALA. CODE § 41-3-1 (2000). The statute reads in part, "The state of Alabama reserves to itself the exclusive right and privilege of exploring, excavating or surveying. . .all aboriginal mounds and other antiquities, earthwork, ancient or historical forts and burial sites within the State of Alabama, subject to the rights of the owner of the land upon which such antiquities are situated, for agricultural, domestic or industrial purposes, and the ownership of the state is herby expressly declared in any and all objects whatsoever which may be found or located therein." *Id.*

3. *See id.*

4. *See id.*

5. *See, e.g.*, Pamela G. Levinson, *Will the Circle be Unbroken? The Miami Circle Discovery and its Significance for Urban Evolution and Protection of Indigenous Culture*, 13 ST. THOMAS L. REV. 283, 331, 339-40 (2000) (cites the Alabama's Antiquity Act as a solution to preservation and calls for "bold legislation" in the preservation context); Christopher A. Amato, *Digging Sacred Ground: Burial Site Disturbance and the Loss of New York's Native American Heritage*, 27 COLUM. J. ENVTL. L. 1, 4 (advocating for the passage of New York's Unmarked Burial Site Protection Act); Patty Gerstenblith, *The Public Interest in the Restitution of Cultural Objects*, 16 CONN. J. INT'L L. 197, 198 (2001) (discussing a public interests in the restitution of looted artifacts); Patty Gerstenblith, *Protection of Cultural Heritage Found on Private Land: The Paradigm of the Miami Circle and Regulatory Takings After Lucas*, 13 ST. THOMAS L. REV. 65, 111 (2000) (Advocating a model ordinance based on the public's opinion of preservation); Pamela D'Innocenzo, Comment, *"Not in My Backyard" Protecting Archaeological Sites on Private Lands*, 21 AM. INDIAN L. REV. 131, 154 (1997) (advocating Alabama's Antiquity Act as the best means for archaeological pres-

though Alabama has an interest in preserving items of antiquity and discouraging looting, section 41-3-1 of the AAA violates the Takings Clause of the Fifth Amendment of the United States Constitution.[6] Alternatively, this Note argues that the AAA violates the Due Process Clause as being vague and overbroad. Part II of this Note introduces the concerned interests involved in artifact looting and the controversy that ignites whenever the Nation's "cultural resources" are threatened.[7] In light of this controversy, the section also discusses the history of common law and Constitutional law concerning property rights over objects found in the ground.[8] Part III examines the AAA in a rational and constitutional context and shows how the statute affects a taking of private property and fails to affect its purpose of preserving antiquities.[9] Part IV argues there are already adequate protections in place to discourage looting and proposes alternatives to unduly burdensome antiquity statutes such as the AAA.[10] Part V concludes that Alabama's interest in historic preservation fails to justify unconstitutional ownership statutes that deprive landowners and people engaged in the hobby of metal detecting of the right to keep what they find on private property.[11] This Note demonstrates that legitimate preservation interests concerning objects of antiquity can coincide with traditional notions of property ownership in the United States.

II. HISTORICAL DEVELOPMENT OF PROPERTY RIGHTS IN THE ARCHAEOLOGICAL ARENA.

To understand the competing interests engaged in the preservation controversy, this section surveys these interests in light of present common law and Constitutional doctrine. Because preservation controversies generally surround specific incidents which take place

ervation); Michael J. Bushbaum, Comment, *Beyond ARPA: Filling the Gaps in Federal and State Cultural Resource Protection* Laws, 23 ENVTL.L. 1353, 1367 (recognizes potential constitutional problems but proposes county ownership of antiquities) *But see* Gene A. Marsh, *Walking the Spirit Trail: Repatriation and Protection of Native American Remains and Sacred Cultural Items*, 24 ARIZ. ST. L.J. 79, 113-16, 132 (acknowledging that across the board reservation of state ownership in artifacts is ineffective).

6. U.S. CONST. amend. V; *see also* RICHARD B. CUNNINGHAM, ARCHAEOLOGY, RELICS AND THE LAW, 208 (1999) (posing the question of whether the statute would constitute a taking).

7. *See infra* Part II.

8. *See infra* Part II.

9. *See infra* Part III.

10. *See infra* Part IV.

11. *See infra* Part V.

throughout the country, this section describes two major recent events that have revived the debate over objects of antiquity found on private property and triggered legislation.[12] This section also briefly mentions recreational metal detecting and how the interests of those engaged in the hobby are not represented by the preservationists and commercial artifact hunters who are in the forefront of the debate.[13] The focus of this section then shifts to the common law and to Constitutional doctrines that govern found property. The common law is important because it promotes the development of important policies and foster expectations about property ownership.[14] Lastly, this section explores the Constitutional doctrine of the Takings Clause of the Fifth Amendment as it has been applied to the unique area of personal property.[15] States can enact laws, unlike the AAA, that demonstrate sensitivity to all of the above considerations and still remain Constitutional, balanced and practical.[16]

A: Looting, Recreational Metal Detecting, and Archaeological Preservation.

Competing interests and notable controversies have heightened awareness of the problem of looting of archaeological treasures and have prompted calls for stricter regulations and enforcement of archeological preservation laws. On one side of the debate are looters and grave robbers who trespass on private property and desecrate graves in order to sell the items on the black market.[17] On the other side are preservationists who look to Federal and state governments to preserve items of archaeological significance. Non-participants with a stake in the preservation controversy are those who engage in the hobby of metal detecting and artifact hunting. These people neither cause any significant property damage nor pose a threat to scientific or cultural resources.[18] At stake for the hobbyists is the existence of a popular pastime that educates the public about the past and returns lost objects

12. *See infra* Part II(A).

13. *See infra* Part II(A)(ii).

14. *See infra* Part II(B).

15. *See infra* Part II(C).

16. *See infra* Part IV.

17. *See infra* text accompanying notes 243-47.

18. *See* Dep't of Natural Res. v. Indiana Coal Council, 542 N.E.2d 1000, 1001 (Ind. 1989).

to circulation.[19] The expectations of private landowners who allow individuals to metal detect on their land are also implicated in the debate. Perhaps a reason that these interests are often overlooked may be because of the emotional nature of these disputes over culturally and historically significant objects.[20]

For almost two thousand years, societies have been struggling with the problems of looting and grave robbing.[21] In fact, the first laws against looting date back to Ancient Rome.[22] Over time, countries have developed different approaches to preservation. For instance, in England the concept of sovereign ownership applies to gold and silver found in the ground.[23] Similarly, other countries have vested ownership of antiquities in the national government.[24] In the United States, the Antiquities Act of 1906[25] and Archaeological Resources Protection Act ("ARPA")[26] have the same effect on federally controlled lands.[27] To prosecute looters on federally controlled lands, ARPA relies on state trespass and looting laws.[28] Unfortunately, trespass and looting laws in the United States are often only enforced in relation to the amount of public awareness of the issue.[29]

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19. *See, eg.*, William R. Paxton, *The Fighting Irish of Altadena?*, EASTERN AND WESTERN TREASURES, Oct. 2001, at 34 (Describing the return of a lost ring found in a park to the true owner).

20. See *infra* text accompanying notes 250-55.

21. *See* RICHARD B. CUNNINGHAM, ARCHAEOLOGY, RELICS, AND THE LAW 15 (1999) [hereinafter ARCHAEOLOGY].

22. *Id.*

23. *See* Leanna Izuel, Comment, *Property Owners' Constructive Possession of Treasure Trove: Rethinking the Finders Keepers Rule*, 38 UCLA L. REV. 1659, 1666, n.48 (1991).

24. *See* Patty Gerstenblith, *The Public Interest in the Restitution of Cultural Objects*, 16 CONN. J. INT'L L. 197, 211, n.56 (2001) (noting that Italy and Turkey have had such laws since 1906).

25. 16 U.S.C. §§ 431-433m (1994).

26. 16 U.S.C. §§ 470aa-470mm (1994).

27. *Id.*

28. *Id.*; *see also* United States v. Gerber 999 F.2d 1112, 1115 (7th Cir. 1993).

29. *See* R.W. "DOC" GRIMM, TREASURE LAWS OF THE UNITED STATES 15 (1993) citing Steve Kinney, *Relic Collector Agrees to Plead Guilty*, THE EVANSVILLE PRESS, Apr. 17, 1992, at 1; For another incident not discussed in this note but which caused considerable scholarly debate about the legal implications of archaeological preservation see, Patty Gerstenblith, *Fifth Annual Tribal Sovereignty Symposium: Protection of Cultural Heritage Found on Private Land: The Paradigm of the Miami Circle and Regulatory Takings After Lucas*, 13 ST. THOMAS L. REV. 65, 111 (2000).

i: The Problem of Looting

The most notable looting incident that sparked great controversy and calls for increased legislation was the "Slack Farm Incident," which occurred in December of 1987 at a farm in western Kentucky.[30] A group of ten individuals, one with a business card stating "Have Shovel, Will Travel" paid a landowner for rights to dig on the landowners' forty acre farm.[31] Upon investigation, state authorities discovered that the digging operation disturbed more than 650 Native American burial sites.[32] Because the men were on private property with the landowner's permission, the men were only charged with the misdemeanor crime of "desecration of a venerable object."[33] That law was originally meant to prevent the toppling of tombstones and the burning of crosses by the Klu Klux Klan.[34] The repercussions from the Slack Farm Incident prompted visceral responses from many groups. Scientists noted that the desecration made it impossible to document and learn from the excavated Native American remains.[35] Native American organizations were outraged to learn of yet another incident where their ancestral remains were desecrated.[36] The Kentucky Legislature reacted and made desecration of graves a felony.[37] Interestingly, the publicity surrounding the Slack Farm Incident escalated the search and trade of Native American artifacts because the news reports exaggerated the value of the items at the grave sites.[38]

Another notable controversy concerned land owned by General Electric known as the "GE Mound," and an artifact dealer, named Ar-

30. *See* ARCHAEOLOGY, *supra* note 21, at 441-44 (citing Harvey Arden, *Who Owns our Past?*, 175 NATIONAL GEOGRAPHIC, Mar. 1989, at 378-85).

31. *See* Suzan H. Harjo, *Last Rites for Indian Dead; Treating Remains Like Artifacts is Intolerable*, L.A. TIMES, Sept. 16, 1998, part 2, at 8.

32. *See* ARCHAEOLOGY, *supra* note 21, at 443.

33. *See id.* at 442.

34. *See id.*

35. *See id.* at 443.

36. *See* Tom Uhlenbrock, *Artifact Collectors Confer with Indians*, ST. LOUIS POST DISPATCH, Mar. 6, 1989, at 18b; Harjo, *supra* note 31. These resentments are deep rooted, Suzan Harjo describes a shocking incident which took place in the 1800's where the U.S. Army conducted an "Indian Cranial Study" where the army after slaughtering 4,500 Cheyenne people decapitated their heads and shipped them to Washington D.C. for study. *Id.*

37. *See* ARCHAEOLOGY, *supra* note 21, at 443.

38. *See* Uhlenbrock, *supra* note 36.

thur Gerber.[39] Gerber received a one year jail sentence for violating the ARPA,[40] after he trespassed onto the GE Mound and removed a significant number of artifacts.[41] A construction worker at the site who also was an amateur relic hunter had notified Gerber of the presence of the artifacts at the site and agreed to take Gerber to the site for $6,000.[42] Notably, before heavy excavation began, archaeologists had surveyed the GE Mound and mistakenly determined that the site was not a burial site.[43] It was the amateur relic hunter that found the 2,000 year old burial mound. Indeed, the GE Mound is currently one of the very largest Hopewell mounds ever constructed.[44] Supporters of Gerber argued that without amateur artifact collectors, the mound would have been bulldozed and the entire mound would be lost.[45] In a sense, Gerber became a martyr for amateur artifact collectors and recreational metal detector users.[46] Organizations such as the American Numismatic Association, the Antique Tribal Arts Dealer Association, the American Society for Amateur Archaeology and several metal detector manufacturers expressed their dissatisfaction with Gerber's conviction.[47] However, the majority of legal commentators praised the decision in *Gerber* as a step in the right direction to expand the scope of archeological protection.[48]

ii. The Hobby of Metal Detecting

The metal detecting hobby originated after the Second World War when the U.S. Government sold surplus land mine detectors to

39. *See* Valerie Richardson, *Collector Finds a Hill of Trouble by Dealing in Indian Artifacts*, WASH. TIMES, May 13, 1995, at A12.

40. 16 U.S.C. §§ 4070aa-470mm (1994); United States v. Gerber 999 F.2d 1112 (7th Cir. 1993).

41. *See Gerber*, 999 F.2d 1112.

42. *See* ARCHAEOLOGY, *supra* note 21, at 291 (citing Cheryl Munson et al., *The GE Mound: An ARPA Case Study*, 60 AMERICAN ANTIQUITY 131 (1995)).

43. *See id.* at 288.

44. *See id.* at 293.

45. *See* Richardson, *supra* note 39.

46. *See id.*; GRIMM, *supra* note 29, at 75.

47. *See* Doug Sword, *Artifact Collectors Hope High Court Overturns Private-Land Ruling*, DENVER ROCKY MOUNTAIN NEWS, Jan. 11, 1994, at 12A.

48. *See* Pamela D'Innocenzo, Comment, *"Not in My Backyard" Protecting Archaeological Sites on Private Lands*, 21 AM. INDIAN L. REV. 131, 137 (1997); Stephanie Ann Ades, Commment, *The Archaeological Resources Preservation Act: A New Application in the Private Property Context*, 44 CATH. U.L. REV. 599 (1995).

the general public.[49] Today, approximately 100,000 recreational metal detectors are sold annually to people who are engaged in the hobby.[50]

The vast majority of metal detecting hobbyists are called "coin shooters" and search for coins, relics, and treasures below the ground.[51] They target these articles within the nine to ten inch range of their detectors. Hobbyists can be found in schoolyards, beaches, playgrounds, public places,[52] and private property with historical significance.[53] Overall, it is estimated that two million people a year engage in some form of treasure hunting.[54]

As a political group, these hobbyists are relatively unorganized and powerless.[55] The main organization, the Federation of Metal Detector and Archaeological Clubs ("FDMAC") is a national organization comprised of 148 regional metal detecting clubs.[56] FDMAC's total membership of 4,000 members is a small representation of the total two million individuals who engage in treasure hunting.[57] The FDMAC has a Code of Ethics that has been adopted by the regional clubs and a major metal detector manufacturer.[58] Because of FDMAC's limited funds, when FDMAC wishes to lobby for a cause or litigate a matter, it

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49. Lynch Denis, *A Brief History of Metal Detectors*, *at* http://www.metal-detect.com/dothost.doc (last visited Jan. 19, 2002).

50. *See* Letter from Jack Lowry, Associate Director of Consumer Sales, Garrett Metal Detecting, to Charles Walsh (Feb. 12, 2002) (on file with New York Law School Law Review).

51. THE PROFILE, *at* www.minelab.com/detecting/profile.html (last visited Jan. 19, 2002); Other recreational uses include prospecting for gold, beach combing and under water exploration. *Id.*

52. David G. Bercaw, Comment, *Requiem for Indiana Jones: Federal Law, Native Americans, and Treasure Hunters*, 30 TULSA L.J. 213, 225 (1994).

53. *See* Ed Fedory, Relic Hunter the Book 23-28 (White's Electronics, 1994).

54. *See* GRIMM, *supra* note 29, at 6.

55. *See* BERCAW, *supra* note 52, at 225.

56. *See Overview of Federation of Metal Detectors and Archaeological Clubs*, *at* http://www.fdmac.com/FDMAC_Policy/Overview.html (last visited Mar. 3, 2001); *see also* Property Rights Congress of America, Inc., *at* http://www.freedom.org/prc (last visited Jan. 19, 2002) (an organization devoted to opposition of uncompensated takings).

57. *See* Overview of Federation of Metal Detectors and Archaeological Clubs, *supra* note 56.

58. *See id.*; GARRETT METAL DETECTORS, OWNER'S MANUAL ULTRA GTA 500, 56; The code of ethics provides in part: I will respect private property and do no treasure hunting without the owner's permission, I will not destroy property, buildings. . ., I will not litter, I will leave gates as found, I will not contaminate wells, creeks or other water supplies, I will fill all excavations. . ., I will appreciate the proper heritage of our natural resources, wildlife and private property. . .,I will never trespass. . ., If live ammunition is found, mark the site and inform authorities. *Id.*

must solicit services from willing attorneys who will work pro bono.[59] Consequently, it is not surprising that the hobby of metal detecting does not receive substantial consideration when legislation affecting the rights of these hobbyists is drafted.[60]

B. The Common Law Found Property Doctrines

There are numerous common law developments and policies concerning finders of lost property embedded in the soil. At common law, a finder's property rights have developed into a hodgepodge of competing doctrines.[61]

Common law categorizes found property as either lost, mislaid, abandoned, treasure trove, or embedded property.[62] This Note focuses only on the treasure trove[63] and embedded property[64] distinctions because they are most applicable to people who remove objects from the soil and thus are superceded by the AAA.[65]

Treasure trove refers to monetary items, such as gold or silver coins, money and bullion that an owner has concealed in a private place.[66] An additional treasure trove requirement that courts sometimes impose is the "appearance of antiquity."[67] This ensures that the true owner will not return for the property because the true owner is most likely deceased.[68] If the property is treasure trove, the general rule, around the turn of the Twentieth Century, was that "[i]n the absence of legislation upon the subject, the title to treasure trove belongs

59. Betty Weeks, *Club News and Views*, EASTERN AND WESTERN TREASURES, Oct. 2001, at 69.

60. *See* BERCAW, *supra* note 52, at 225.

61. *See* IZUEL, *supra* note 23, at 1681-86.

62. *See* RAY ANDREWS BROWN, THE LAW OF PERSONAL PROPERTY §3.2 (3rd ed. Callaghan & Co. 1955).

63. In England, the treasure trove doctrine awarded goods to the crown. *Id.* In the United States, the doctrine was modified to reward the finder of the lost treasure. *See* IZUEL, *supra* note 23, at 1667; *eg:* Campbell v. Col. Cochran, 416 A.D.2d 211, 222 n.10 (Del. 1980).

64. Constructive possession includes the embedded property category. *See* BROWN, *supra* note62, at § 3.2.

65. *See id.* at § 3.1-2. Different rules emerged depending on whether the finder was a trespasser, Barker v. Bates, 23 Am. Dec. 678 (Mass. 1832) (found property awarded to landowner), licensee, Weeks v. Hackett, 104 Me. 264 (1908); or whether the property was lost, mislaid or abandoned. *See generally* BARLOW BURKE, PERSONAL PROPERTY, 103 (1983).

66. *See* BURKE, *supra* note 65, at 103.

67. *See* 1 AM. JUR.2d *Abandoned, Lost, Etc., Property* § 4 (1962).

68. *See id.*

to the finder as against all the world except the true owner."[69] The place where the finder discovered the treasure trove is immaterial.[70]

In fashioning the treasure trove doctrine, courts have put forth two important policy concerns to explain the rule. First, courts recognize that 'but for' the finder, the goods would have remained hidden from the rest of the world and outside of circulation.[71] Second, the "appearance of antiquity" requirement ensures that the true owner will not return to reclaim the property because he or she is presumably deceased.[72] Although these justifications appear legitimate, some commentators suggest that courts are actually subscribing to emotion instead of logic and therefore do not apply the doctrine consistently.[73] For instance, in an action to recover thirty seven pounds of gold, the Georgia Court of Appeals in *Groover v. Tippins*[74] described the glamour of finding lost treasure by quoting Robert Louis Stevenson and conceded that "the search for [Black Beard and Captain Kidd's] treasure will continue to thrill millions yet unborn."[75] Indeed, it is easy to imagine that courts are sometimes swayed by the unusual circumstances that accompany the recovery of treasure trove.[76] As Richard Cunningham, a noted commentator on archeology law, stated "[t]he old rule of treasure trove may make good theater, but it's poor law, and its death can come none too soon."[77]

Consequently, the modern trend among courts has been to abandon the treasure trove doctrine and adopt alternative theories.[78]

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69. Weeks v. Hackett, 104 Me. 264 (1908) (Court awarded buried coins to employees of landowner who were excavating and discovered gold coins buried by supposed former owner of property). For cases supporting this proposition, *see* Davidson v. Strickland, 243 S.E.2d 705, 708(Ga. Ct. App. 1978); Grover v. Tippins, 179 S.E. 624, 635 (Ga. Ct. App. 1935). This also applies to found property. *See* Armory v. Delamirie, 93 Eng. Rep. 664 (1722)(the leading case on the "finder's keepers" rule).

70. *See Armory*, 93 Eng. Rep. at 664.

71. *See Grover*, 179 S.E. at 634 (1935); BURKE, *supra* note 65, at 104.

72. *See* IZUEL, *supra* note 23, at 1675.

73. *See id.*

74. 179 S.E. 634 (Ga. App. 1935).

75. *Id.* at 635.

76. *See* IZUEL, *supra* note 23, at 1675.

77. Richard B. Cunningham, *The Slow Death of the Treasure Trove* (Feb. 7 2000), *at* http://www.archaeology.org/online/features/trove/ (last visited Jan. 26, 2002).

78. *See* Corliss v. Wenner, 34 P.3d 1100, 1105-6 (App. Ida. 2001) (court refused to recognize treasure trove doctrine); Danielson v. Roberts, 74 P. 913, 914 (Or. 1904) (considers law of treasure trove to have merged with the law governing lost goods); Klein v. Unidentified, Wrecked & Abandoned Sailing Vessel, 758 F.2d 1151, 1514 (11th Cir. 1985) (treasure from a sunken ship identified as embedded property); Ritz v. Selma

Courts that reject the treasure trove doctrine grant possession to the landowners through the embedded property doctrine, also known as constructive possession.[79] The constructive possession doctrine's goals are to protect landowners' ownership expectations of items embedded in the land[80] and to discourage trespassers from entering the land.[81] Another purpose of constructive possession is to maximize the true owners' chances of reclaiming their property.[82] The constructive possession doctrine has been adopted by an increasing number of courts, most recently in *Corliss v. Wenner*.[83] In *Corliss*, the Idaho Court of Appeals rejected the treasure trove doctrine and awarded title to a glass jar of gold coins that was found by construction workers to the landowners.[84] The court rejected the treasure trove doctrine because the court thought that the doctrine would encourage people to trespass on private property in search for treasure.[85] Instead, the court recognized that present-day land ownership includes things above and below the ground and that constructive possession comports to this developed expectation.[86]

Whether courts seek to reward either the finder for his diligence in unearthing the object, or the landowner for his comprehensive ownership expectations, no state has adopted the English rule that items found in the ground belong to the state or the sovereign.[87] Accordingly, any state or federal law awarding title to found property to a state contravenes deeply rooted common law policies behind the treasure trove and constructive possession doctrines, and frustrates expecta-

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United Methodist Church, 467 N.W.2d 266, 269 (Iowa 1991)(coins found buried in cans and jars under a garage floor was classified as mislaid); Morgan v. Wiser, 711 S.W.2d 220. 223 (Tenn. Ct. App. 1985) (buried coins were classified as embedded property); *see generally* BROWN, *supra* note 62.

79. *See* BROWN, *supra* note 62; The constructive possession doctrine originates from England and states "[t]he possession of land carries with it in general, by our law, possession of everything which is attached to or under our land. . .And it makes no difference that the possessor is not aware of the things existence" South Staffordshire Water Co. v. Sharam, 2 Q.B. 44 (1896) (internal citations omitted).

80. *See* IZUEL, *supra* note 23, at 1697; *South Staffordshire Water Co.*, 2 Q.B. at 44.

81. *See Corliss*, 34 P.3d at 1106; BROWN, *supra* note 62, at § 3.5.

82. *See* BROWN, *supra* note 62, at § 3.5 (stating that the finder sometimes acts as a bailee for the true owner).

83. 34 P.3d 1100 (Ida. App. 2001)

84. *Id.*

85. *Id.* at 1106.

86. *Id.* at 1106-08.

87. Cambpell v. Col. Cochran, 416 A.D.2d 211, 222 n.10 (Del Super. Ct. 1980).

tions consistent with such policies that have developed over several centuries.

C: The Constitutional Development of Property Rights

This section discusses the development of the United States Supreme Court's doctrine under the Takings Clause of the Fifth Amendment to the United States Constitution.[88] This section then focuses on the Court's struggle to apply the takings clause doctrine to personal property.

In order to trace and gain an understanding about the "crazy quilt pattern of the Supreme Court's doctrine"[89] regarding takings, it is important to mention the values that were placed on property rights to limit legislative power.[90] Initially, property rights acted as a limit to the scope of government action.[91] The highpoint of property protection and freedom of contract occurred in *Lochner v. New York*,[92] where the Court used the Fourteenth Amendment's Due Process Clause to strike down a minimum wage requirement.[93] This protection of economic liberties ended in the late 1930s and the court has since abandoned the due process clause as a means of interference with property rights.[94] The Court now relies on the Fifth Amendment's Just Compensation Clause.[95]

Although uncompensated takings regularly took place before 1776,[96] the Constitution's framers recognized the importance of insti-

88. U.S. CONST. amend. V.

89. JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 11.10, at 469 (6th ed. 2000) (quoting Dunham, *Griggs v. Allegheny County in Perspective: Thirty Years of Supreme Court Expropriation Law*, 1962 SUP.CT.REV. 63 (1962)).

90. JENNIFER NEDELESKY, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM, 223-29 (1990).

91. *Id.*

92. 198 U.S. 45 (1905).

93. *Id.* While *Lochner* has been criticized for its lack of judicial deference to the legislature, constitutional scholar Cass R. Sunstein argues that *Lochner* can also be understood as to "refer to preservation of the existing distribution of wealth and entitlements under the baseline common law. Thus understood, *Lochner* has been hardly overruled." Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 875 (1987).

94. *See* West Coast Hotel v. Parrish, 300 U.S. 379 (1937). This case is conventionally known as the turning point. *See* NEDELSKY, *supra* note 90, at 226.

95. U.S. CONST. amend. V; *see generally*, Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922); Penn Central Transp. v. City of New York, 438 U.S. 104 (1978).

96. *See* William M. Treanor, *The Origin and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J. 694, 699-97 (1985).

tuting a limit on the government's power over individuals.[97] In response to this concern, James Madison drafted the Fifth Amendment's Compensation Clause.[98] The Compensation Clause provides that "No person shall be. . .deprived of life, liberty or property without due process of law;. . .nor shall private property be taken for public use without just compensation."[99]

Notwithstanding the textual suggestion of a "public use" requirement, the Supreme Court has held that the takings clause does not prohibit the government from taking private property. Instead, the Compensation Clause places conditions on the government's exercise of that power.[100] Over time, the Court has interpreted the public use requirement to mean virtually any use.[101] For example, in *Berman v. Parker*,[102] the Court held that even a redistribution of property to a private entity satisfies the public use requirement.[103]

Although the Supreme Court generally refuses to interfere with state action based on a broad interpretation of public use,[104] the Court does recognize a need for compensation when states affect individuals' property rights.[105] Today, the Court struggles with what government actions constitute compensable takings.[106]

In answering modern takings issues, the Court has developed an ad hoc and per se approach to define what constitutes a compensable taking.[107] The ad hoc approach first developed because of burdensome regulations.[108] The Court also occasionally applies the ad hoc

97. *See id.* Before 1776, uncompensated takings regularly took place by the colonies with respect to real property in order to promote economic growth. While few felt that the federal government would have the occasion to take property, Madison saw the protection of property as critical. *Id.*

98. *See* NEDELESKY, *supra* note 90, at 17-22.

99. U.S. CONST. amend. V.

100. *See* First Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 314 (1987); Williamson County Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985); Monongahela Navigation CO. v. United States, 148 U.S. 312, 313 (1893).

101. *See* Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229, 239-48 (1984);

102. 348 U.S. 26 (1954).

103. *Id.*

104. *See* NOWAK, *supra* note 89, § 11.13, at 498.

105. *See* Berman v. Parker, 348 U.S. 26 (1954).

106. *See* NOWAK *supra* note 89, at §11.12.

107. *See infra* text accompanying notes 110-29.

108. *See* Pennsylvania Coal v. Mahon, 260 U.S. 393 (1922); Penn Central v. City of New York, 438 U.S. 104 (1978).

approach to personal property.[109] The ad hoc approach was first used in *Pennsylvania Coal v. Mahon*.[110] Justice Holmes recognized that the extent of a property's diminution in value was "a question of degree" and could not be disposed of by per se propositions.[111] *Penn Central v. City of New York*,[112] refined this analysis. *Penn Central* involved the owners of Grand Central Station who were unable to obtain approval to build a skyscraper above the station.[113] The Court announced three considerations to be used in the ad hoc analysis.[114] These considerations are: (1) the impact of the regulation on the claimant; (2) the interference with reasonable investment backed expectations; and (3) the character of the government action.[115] The Court held that the denial of a permit to build a skyscraper above the station was not a taking because the city had only denied the owners' right to use the above airspace, the denial was not discriminatory, and the owners could still realize a return on their investment.[116]

The Court adopted a similar approach to *Penn Central*, when dealing with federal regulations concerning personal property of historical significance.[117] In *Andrus v. Allard*,[118] the Court did not find a compensable taking where federal statutes and regulations[119] banned the sale and interstate transportation of artifacts containing certain bird feathers.[120] The Court held that the Migratory Bird Treaty Act[121] and

109. *See* Andrus v. Allard, 444 U.S. 51 (1979); *see also* Washington Legal Found. v. Legal Found. of Washington, 271 F.3d 835, 857 (9th Cir. 2001) (applied an ad hoc analysis to determine whether there was a taking of interest in a bank account); *but see* Washington Legal Found. v. Texas Equal Access to Justice Found., 270 F.3d 180, 186 (5th Cir. 2001) (applied per se analysis to determine whether there was a taking of interest in a bank account).

110. 260 U.S. 393 (1922); *see also* Keystone Bituminous Coal Assn.v. DeBenedictis, 480 U.S. 470 (1987).

111. *Mahon*, 260 U.S. at 115-18.

112. 438 U.S. 104 (1978).

113. *See id.* at 115-18.

114. *See id.* at 124.

115. *See id.*; *see also* Hodel v. Irving, 481 U.S. 704 (1987) (Court applied ad hoc analysis to government statute which interfered with rights to pass on property to one's heirs).

116. *See Penn Central*, 438 U.S. at 128-38.

117. *See* Andrus v. Allard, 444 U.S. 51 (1979).

118. *Id.*

119. *Migratory Bird Treaty Act*, 16 U.S.C. § 703 (1978); *Eagle Protection Act*, 16 U.S.C. § 668 (a); 50 C.F.R. § 21.2(a), 22.2(a) (1978).

120. *Andrus*, 444 U.S. at 54.

121. 16 U.S.C. § 703 (1978).

Eagle Protection Act[122] did not amount to a taking because the statutes did not compel the surrender of the items to the government and there was no invasion or restraint by the government on the items.[123] For instance, the Court hypothesized that the person affected by the statutes could still be able to "exhibit the artifacts for an admissions charge."[124] Like *Penn Central*, the Court held that a taking had not occurred because it was unclear that the appellees would be unable to derive some economic benefit from the artifacts.[125]

In addition to the ad hoc analysis, the Supreme Court has put forth two per se rules regarding what constitutes a taking. First, the Court in *Lucas v. South Carolina Coastal Council*,[126] held that a compensable taking occurs when a real property owner is called to sacrifice all economically beneficial uses of the propery.[127] Second, in *Loretto v. Teleprompter Manhattan CATV Corp.*,[128] the Court held that any permanent physical occupation of private property constituted a taking.[129]

Not surprisingly, the existence of different tests to determine what constitutes a taking creates confusion. Presently, there is a circuit split concerning what analysis to apply to earned interest in a bank account.[130] While the Supreme Court has not spoken directly to the issue of whether or not a per se or ad hoc analysis is appropriate for interest money taken by the state, the Court has rejected the application of a per se rule in the context of fungible goods such as money.[131] The Court's reasoning was that because money is neither personal nor real property it is not subject to the per se rules.[132] Clearly, this reasoning is inapplicable to unique items such as artifacts.

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122. 16 U.S.C. § 668 (1978).

123. *Andrus*, 444 U.S. at 65-66.

124. *Id.*

125. *Id.* at 66.

126. 505 U.S. 1003 (1992).

127. *Lucas*, 505 U.S at 1003; *See* NOWAK & ROTUDNA, *supra* note 89, §11.12 at 480.

128. 458 U.S. 419 (1982).

129. *Loretto*, 458 U.S. at 426.

130. *See* Washington Legal Found. v. Legal Found. of Washington, 271 F.3d 835 (9th Cir. 2001), *cert granted*, 122 S.Ct. 2355 (2002) (Applied ad-hoc inquiry to interest earned in a bank account); Washington Legal Found. v. Texas Equal Access, 270 F.3d 180 (5th Cir. 2001) (Applies per-se inquiry to interest earned in bank account).

131. *See* United States v. Sperry Corp., 493 U.S. 52 (1989); Eastern Enter. v. Apfel, 524 U.S. 498 (1998) (requirement to pay millions in employee benefits was not a per se taking).

132. *Sperry Corp.*, 493 U.S. at 62 n.9.

In *Nixon v. United States*,[133] the D.C. Court of Appeals applied the per se rule when determining whether the *Presidential Recordings and Materials Preservation Act*,[134] constituted a taking of former President Nixon's presidential papers. In dicta, the Supreme Court has supported the D.C. Circuit's application of the per se rule.[135] Nonetheless, the Court has yet to apply a per se rule to personal property.[136]

Because the Court's definition of what constitutes a taking has wavered,[137] there is confusion as to whether a per se or ad hoc approach best applies to a statute that reserves ownership to the state of personal property found in the ground. Because the AAA is a blanket declaration of ownership of all artifacts owned below the ground and artifacts are unique items, the better approach is to determine that the statute applies as a per se taking. Nonetheless, as will be discussed in Part III, both a per se and ad hoc analysis compel the same result.

D. The Deferential Trend in Scrutiny of Archaeological Protection Acts

The Alabama's Antiquity Act ("AAA")[138] has yet to be constitutionally challenged. Nevertheless, less draconian statutes have withstood takings and due process challenges.[139] Courts are sympathetic to preservationists and one court has gone so far as to expand the scope of an archaeological protection act to private property.[140] State and federal courts are siding with governments and archaeological preservationists by allowing increased control over activities undertaken by private landowners.[141]

In *Department of Natural Resources v. Indiana Coal Council*,[142] the Indiana Supreme Court held that a mining prohibition on a small area of land did not amount to a taking.[143] The Indiana State Department

133. 978 F.2d 1269 (D.C. Cir. 1992).

134. 88 Stat. 1695 (1974).

135. *Sperry Corp.*, 493 U.S. at 62 n.9 (1989) (stating that money is not personal or real property, thus not subject to the per se doctrine).

136. *Id.*

137. *See* NOWAK & ROTUDNA, *supra* note 89, at § 11.12.

138. ALA. CODE § 41-3-1 (Michie 2000).

139. *See* Dep't of Natural Res. v. Indiana Coal Council, 542 N.E.2d 1000 (Ind. 1989); Hunziker v. Iowa, 519 N.W.2d 367 (Iowa 1994); Washington v. Lightle, 944 P.2d 1114 (Wash. App. 1997).

140. *See* Whitacre v. Indiana, 619 N.E.2d 605 (Ind. App. 1993) *affirmed*, 629 N.E.2d 1236 (1994).

141. *See* ARCHAEOLOGY, *supra* note 21, at 349.

142. 542 N.E.2d 1000 (Ind. 1989).

143. *Id.*at 1001.

of Natural Resources designated a portion of the mining site unsuitable for surface coal mining because the site contained archeologically significant material.[144] The court accepted the notion that the preservation of national and state heritage was within the "broad range of government interests."[145] The court reasoned that while the designated land could not be mined, the impact on the property was only a six and a half percent loss of the total mining area.[146] Because the mining company could still use the majority of its property the court followed the *Penn Central*[147] analysis and did not find the restriction to constitute a taking.[148]

Similarly, developers in *Hunziker v. State of Iowa*,[149] suffered a substantial loss of value in their investment after the Supreme Court of Iowa held that an archaeological preservation statute did not constitute a taking.[150] Pursuant to a state statute,[151] the state archaeologist prohibited any disruption of the developer's newly purchased lot because it contained a Native American burial mound.[152] The court held that even though the human remains were not discovered until after the developer bought the land, the statute gave the state archaeologist the right to prevent any disturbance of the ground before the sale.[153] This limitation on the land's use was present in the title before the land was sold.[154] As a result of this action, the value of the property instantly declined from its purchase price of $50,000 to $100.[155] Four years after the ruling, the lot was still owned by the developer and continued to decay.[156] Attempts to dispose of the lot to neighboring landowners, neighborhood associations and governmental entities for garden space or public access were all unsuccessful.[157] The implication of the Supreme Court of Iowa's decision is that landowners in Iowa

144. *Id.*
145. *Id.* at 1004.
146. *Id.*
147. *See supra* text accompanying notes 112-16.
148. *Indiana Coal Council*, 542 N.E.2d at 1003.
149. 519 N.W.2d 367 (Iowa 1994).
150. *Id.* at 371.
151. IOWA CODE § 305A.9 (1991).
152. *Hunziker*, 519.N.W.2d at 368.
153. *Id.* at 368-69.
154. *Hunziker*, 519 N.W.2d at 371.
155. *Id.* at 372 (Snell J., dissenting).
156. *See* ARCHAEOLOGY, *supra*, note 21, at 520.
157. *See id.*

take their land subject to the risk that there might be undiscovered remains that might prevent any sale or feasible use of the property.[158]

Aside from takings challenges, courts have addressed other Constitutional issues present in archaeological protection statutes.[159] One problem is the void for vagueness issue present in the definitions of "archaeological resources",[160] "antiquity",[161] or "object of antiquity".[162] In *United States v. Diaz*,[163] the Ninth Circuit held that the use of the words "ruin", "monument", and "object of antiquity" in the Antiquities Act of 1906[164] was unconstitutionally vague.[165] The court reasoned that the Antiquities Act failed to articulate what objects were protected by the Act.[166] However, in *Washington v. Lightle*,[167] the Washington Court of Appeals addressed an attack on a Washington Statute[168] that made it a crime to dig on private or public lands that were deemed "archaeological resources".[169] Because the Washington statute had a comprehensive definition of what constituted an "archaeological resource", the court determined that the statute as applied was not vague because it defined the exact artifact that the defendants were excavating.[170] The court was not presented with the opportunity to address whether the statute was facially unconstitutional.[171]

In Indiana, the Court of Appeals of Indiana went so far as to extend a regulatory statute to apply to private property.[172] In *Whitacre v.*

158. *See Hunziker*, 519 N.W.2d at 372(Snell J., dissenting)("It is pernicious because there is virtually no notice to a landowner of the State's inchoate claim and no opportunity to review the government action or appeal to the courts"); This case may no longer be good law as the United States Supreme Court recognized this danger and held that "[f]uture generations too, have the right to challenge unreasonable limitations on the use of land." Palazollo v. R.I., 533 U.S. 606, 627 (2001).

159. *See* United States v. Diaz, 499 F.2d 113 (9th Cir. 1974); Washington v. Lightle, 994 P.2d 1114 (Wash. App. 1997).

160. *See infra* text accompnaying notes 242-43.

161. *See* ALA. CODE, § 41-3-1 (2000). "Antiquity" is not defined in the statute.

162. United States v. Diaz, 499 F.2d 113 (9th Cir. 1974).

163. *Id.*

164. 16 U.S.C. §§ 431-33 (1988).

165. *Diaz*, 499 F.2d at 114.

166. *Id.*

167. 994 P.2d 1114 (Wash. App. 1997).

168. WASH. REV. CODE § 27.53.060 & 27.53.040 (1997).

169. *Lightle*, 994 P.2d at 1116.

170. *Id.*

171. *Id.*

172. Whitacre v. Indiana, 619 N.E.2d 605 (Ind. App. 1993), *aff'd*, 629 N.E.2d 1236 (1994).

Indiana,[173] a man and wife who were amateur archaeologists purchased a piece of property to excavate and remove historical artifacts.[174] After the legislature passed the Indiana Historic Preservation Act,[175] the parties sought a declaratory judgment to rule that the statute was inapplicable to privately owned property.[176] Although the Indiana Preservation Act did not explicitly mention private property, the Indiana Court of Appeals held that the Act required those disturbing the ground on private or public property to obtain approval from the Department of Natural Resources.[177] On appeal, the Indiana Supreme Court affirmed the opinion, but remarked in a footnote that Whitacre had waived his unconstitutional taking argument.[178]

E. The Antiquity Act of Alabama

There has yet to be a court challenge to the Alabama's Antiquities Act ("AAA"). However, in an administrative proceeding the Federal Energy Regulatory Commission ("FERC") documented the enforcement of the statute.[179] During construction of the North Alabama Pipeline Project, Southern Natural Gas Company ("Southern") excavated a substantial portion of private property and removed an undisclosed amount of artifacts.[180] Southern was unable to return the artifacts to the landowners because the AAA precluded return of the artifacts to owners without Alabama's consent.[181] In response, a group of landowners complained to the FERC about Southern's removal of artifacts from their property without consent and demanded the objects back.[182] The Alabama Historical Commission refused to immediately return the objects. However, the Alabama Historical Commission did note that "after curation and study" it might be willing to lend some of the artifacts to the landowners.[183] The FERC sided with the Alabama Historical Commission and directed the landowners to con-

173. 619 N.E.2d 605.
174. *Whitacre*, 619 N.E.2d at 606.
175. IND. CODE ANN. § 14-3-3.4 (2000).
176. *Whitacre*, 619 N.E.2d at 606.
177. *Whitacre*, 619 N.E.2d at 607.
178. 629 N.E.2d 1236 (Ind. 1994).
179. In Re: Southern Natural Gas Co., 85 Fed. Energy Reg. Comm'n Rep. (CCH) P 61, 134, 1998 W.L. 758062 at *54.
180. *Id.*
181. *Id.*
182. *Id.*
183. *Id.* at *53-54 (Internal quotations omitted).

tact the Historical Commission to arrange for a loan agreement.[184] As of date, the artifacts have not been returned to the landowners.[185]

It is important to note that the AAA does not mention loan arrangements to affected landowners. While the AAA allows Alabama to excavate historically significant sites subject to the rights of some landowners, the AAA contains a blanket ownership statement of artifacts in the land which supercedes the rights of the landowners. The AAA provides that:

> "The State of Alabama reserves itself the exclusive right and privilege of exploring, excavating or surveying, through its authorized officers, agents or employees, all aboriginal mounds and other antiquities, earthworks, ancient or historical forts and burial sites within the State of Alabama, subject to the rights of the owner of the land upon which antiquities are located, for agricultural, domestic or industrial purposes, and the ownership of the state is hereby expressly declared in any and all objects whatsoever which may be found or located therein."[186]

Violation of the AAA is also punishable as a misdemeanor.[187]

Even though the current trend among state courts is to find similar preservation statutes Constitutional, the AAA is distinguishable from other statutes as it reserves blanket ownership rights to Alabama. Thus it is possible for a court to find the AAA unconstitutional. The rest of this Note demonstrates that this result is both well founded and desirable.

III: Analysis of The Alabama Statute That Reserves the Right of Ownership for the State of All Property Found Below the Ground

The AAA is subject to Constitutional challenge under both the due process and takings clauses of the Fifth and Fourteenth Amend-

184. *In re Southern Natural Gas Co.*, 85 Fed. Energy Reg. Comm'n Rep. (CCH) at 134, 1998 W.L. at *54.

185. Telephone Interview with Myra Banks, Alabama Historical Commission (May 1, 2002).

186. Ala. Code § 41-3-1 (2000).

187. *See* Ala. Code § 41-3-6 (2000) The section is entitled "Criminal Penalties" and states: "Any person who shall explore or excavate any of the aboriginal mounds, earthworks or other antiquities of this state contrary to the laws of this state shall be guilty of a misdemeanor and, upon conviction, shall be fined not more than $1,000.00 for each offense."

ments of the United States Constitution. This part of the Note argues it is unconstitutional on both grounds. First, this section argues the AAA is distinguishable from the statute in *Washington v. Lightle.*[188] Unlike the statute in *Washington,*[189] the AAA fails to define any of its material terms.[190] Second, this section shows that although there may be a cognizable state interest in protecting archaeological resources,[191] the AAA affects a taking because it strips landowners of a traditional private property right.[192]

First, the AAA's language is ambiguous as to whether or not the state reserves the right of ownership to "antiquities" only or to "any and all objects whatsoever which may be found or located" in the ground.[193] Even assuming that the statute only applies to "antiquities," the AAA is unclear as to whether the watch that Eric found, from the hypothetical in section I,[194] is an antiquity.[195]

Antiquity has several common definitions. The two most relevant definitions are that an antiquity is "an object from ancient times",[196] and has "the quality of being old or ancient".[197] Clearly a watch from the civil war era could be something of considerable age, however, does that same watch qualify as an antiquity if it was dropped in the ground last night? Furthermore, does an object have to be something of value before it becomes an antiquity? Like *Diaz,* where the court invalidated the Antiquities Act of 1906 for not providing notice of what

188. 994 P.2d 1114 (Wash. App. 1997).

189. *Id.*

190. The statute reads: "The State of Alabama reserves itself the exclusive right and privilege of exploring, excavating or surveying, through its authorized officers, agents or employees, all aboriginal mounds and *other antiquities*, earthworks, ancient or historical forts and burial sites within the State of Alabama, subject to the rights of the owner of the land upon which such antiquities are situated, for agricultural, domestic or industrial purposes, *and the ownership of the state in any and all objects whatsoever which may be found or located therein.* ALA. CODE § 41-3-1 (2000).

191. *See* Andrus v. Allard, 444 U.S. 51, 64 n.20 (1979); *Whitacre,* 619 N.E.2d at 606.

192. *See supra* Part II(C); For another section of the Alabama Code which is facially discriminatory and may violate the dormant commerce clause see ALA. CODE, § 41-3-2 (Michie 2000), which prohibits any non residents, or their agents from exploring or excavating historical sights or taking them out of the state. *Id.*

193. *Id.*

194. *See supra* text accompanying notes 1-2.

195. *See* ALA. CODE § 41-3-1 to 41-3-6, 41-9-24 to 41-9249.1. Nowhere in the Code is antiquity or antiquities defined.

196. AMERICAN HERITAGE COLLEGE DICTIONARY 60 (3d ed. Houghton Mifflin 1993).

197. *Id.*

constituted an "artifact",[198] the AAA fails Constitutional muster for the same reason. Without clear definitions of what objects in the ground constitute an "artifact", the Alabama Historical Commission in the Southern case[199] could have had the objects appraised, and then returned all the objects with low value to the landowner and reserved the valuable objects for the Commission.

The AAA is unlike the Washington Preservation Statute,[200] which has the term "archaeological resource" internally defined within the statute.[201] This internal definition made the Washington statute applicable to the defendants in *Washington v. Lightle,* who were digging for arrowheads.[202] In applying the same void for vagueness test that was applied in *Lightle,* to the AAA, it is clear that the AAA allows for discriminatory law enforcement by Alabama because the statute does not define objective standards.[203]

Furthermore, the AAA's language fails to recognize that there are differences between looters who raid tombs to sell items on the black market[204] and hobbyists with metal detectors.[205] The casual hobbyist does not disturb the ground, nor does he necessarily have an interest in selling found items.[206] While the federal ARPA statute recognizes this difference between looters and an individual hunting for relics on

198. United States v. Diaz, 499 F.2d 113 (9th Cir. 1974).

199. *See In Re Southern Natural Gas Co.*, 85 Fed. Energy Reg. Comm'n Rep. (CCH) P 61, 134, 1998 W.L. 758062 at *54.

200. WASH. REV. CODE § 27.53.040 (1997).

201. *Id.* "archaeological resource" is defined as "All sites, objects structures, artifacts, implements, and locations of prehistoric or archaeological interest, whether previously recorded or still unrecognized, including, but not limited to. . .implements of culture such as projectile points, arrowheads. . .and other implements and artifacts of any material. . .are hereby declared archaeological resources." *Id.*

202. Washington v. Lightle, 994 P.2d 1114, 1116 (Wash. App. 1997)

203. *Id.*

204. *See* Harvey Arden, *Who Owns Our Past?*, 175 NATIONAL GEOGRAPHIC, Mar. 1999, at 378-85. Recounts the story of the "Slack Farm Ten" scandal where the alleged looters desecrated approximately 650 burials. Excerpt obtained from ARCHAEOLOGY, *supra* note 21, at 272.

205. *See* FEDORY, *supra* note 53, at 132.

206. *Id.* at 132.

his own property,[207] the AAA reserves the right to state possession for all antiquities in the ground before they are even discovered.[208]

The AAA also fails to provide just compensation for the taking of personal property. In Alabama Code § 41-9-249, the Alabama Historical Commission has the power to "acquire by exercise of eminent domain, historic *structures* of paramount or exceptional importance."[209] The AAA contains no such compensation provision.[210] This is particularly troubling in light of the events in Southern, where the Alabama Historical Commission did not offer any type of compensation for the taking of the artifacts, but instead offered to "loan" selected artifacts back to the property owners.[211]

Based on the intrusiveness and effect of the AAA, the choice to apply either a per se or ad hoc approach to the AAA requires that just compensation be provided within the statute. As a threshold matter, Alabama would be justified in taking property pursuant to the "public use"[212] requirement as stated in the Alabama Historical Commission's Charter.[213] The Charter outlines the interest of preserving the State's historical heritage.[214]

Although the Commission's intention would probably qualify as a "public use,"[215] it is questionable whether the Alabama's action of reserving the right to ownership of personal property found in the ground warrants a per se or ad hoc takings analysis. Claiming ownership of items before they are excavated, deprives the future artifact finder of the property's economic value.[216] Furthermore, the land

207. *See* 16 U.S.C. § 470aa (1988). ARPA defines "archaeological resource" as "any material remains of past human life" or remains of activities which are more than 100 years old. ARPA specifically excludes arrowheads found on the surface, rocks, coins, bullets or minerals which are not archaeologically significant. *Id.*

208. ALA. CODE § 41-3-1 (2000).

209. ALA. CODE § 41-9-249 (2000).

210. ALA. CODE § 41-3-1.

211. *In Re Southern Natural Gas Co.*, 85 Fed. Energy Reg. Comm'n Rep. (CCH) P 61, 134, 1998 W.L. 758062 at *54.

212. *See* Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229, 239-48 (1984).

213. ALA. CODE § 41-9-240 (2000).

214. ALA. CODE § 41-9-240 states: "[t]he historical heritage of the State of Alabama is among its most valued and important assets, and the preservation of historic sites, building and objects within the state is of substantial concern to Alabama and its people. It is of special value to the youth of Alabama as a constant reminder of the circumstances under which our state was born and nurtured and under which our great nation has developed." *Id.*

215. *See Hawaii*, 475 U.S. at 239-48.

216. *See supra* text accompanying notes 124-25.

owner who purchased the property with the expectation of owning everything above and below the surface may find that not to be true if the state chooses to exercise sovereign ownership over any excavated items. This would be impermissible under a per se approach where Alabama has deprived citizens of all beneficial economic use of their property.[217]

Whether Alabama's action of acquiring property qualifies as a taking under the ad hoc analysis depends on an interpretation of the Supreme Court case of *Andrus*.[218] In *Andrus*, a decisive factor in the Court not finding the Migratory Bird Treaty Act a taking was because the statute did not compel the defendant to surrender artifacts.[219] The AAA does compel a property owner to surrender personal property. This is evidenced by the situation in Southern, where the landowners were unable to get their artifacts.[220] Therefore, the AAA should be found to be a compensable taking.

As a second matter, the Supreme Court would also have to decide whether the Historical Commission's offer to loan certain artifacts back to the landowners and granting temporary right to possession saves the statute from constituting a taking.[221] Nonetheless, the loan offer still constitutes a taking because the AAA causes landowners to lose bargaining power with respect to the artifacts and the ability to dispose of them. The loss of bargaining power is like the situation in *Nixon v. United States*[222] where the D.C. Circuit Court of Appeals held that simply giving Richard Nixon access to his presidential papers for his own autobiographical and historical work did not relieve the government of its obligation to compensate the former president.[223] Thus, the mere offer to simply loan some of the artifacts back to the landowners is insufficient to save the AAA from constituting a taking.

Without just compensation for the AAA's reservation of ownership, the AAA undermines Alabama's preservationist purpose. Consequently, the AAA discourages finders from removing artifacts from the

217. *See* Lucas v. South Carolina Coal Council, 505 U.S 1003; NOWAK & ROTUNDA, *supra* note 89, §11.12 at 480.

218. 444 U.S. 51.

219. *Id.* at 65.

220. *In Re Southern Natural Gas Co.*, 85 Fed. Energy Reg. Comm'n Rep. (CCH) P 61, 134, 1998 W.L. 758062 at *54.

221. *Andrus*, 444 U.S. at 65.

222. 978 F.2d 1269 (D.C. Cir. 1992).

223. *Id.* at 1285.

soil.[224] This discouragement risks the loss of significant cultural resources that will remain unearthed. The AAA is a prime example of how excessive abrogation of individual property rights "invites private conduct that will negate its intended consequences."[225]

The AAA also conflicts with common law rationales and traditions.[226] The AAA destroys economic and practical motivations to search for and unearth any undiscovered artifacts.[227] Moreover, the AAA is inconsistent with Alabama's lost property statute.[228] Under § 32-12-4 of the statute, the finder may take care of a lost object and obtain compensation for expenses related to holding the item.[229] Subsequently, the finder is entitled to sell the item if the owner cannot be found with reasonable diligence.[230] Thus, the finder of a watch embedded in his property has a motivation to be untruthful and simply claim that he found the item above the ground or purchased it a yard sale in order to avoid being subject to the AAA. This encouragement of dishonesty is consistent with Richard Epstein's view that "[e]ach form of [excessive] regulation invites private conduct which will negate its intended consequences."[231] As demonstrated above, the AAA actually endangers the artifacts that the AAA was designed to protect. Accordingly, states such as Alabama should reconsider the concept of sovereign ownership of private property found below the ground, and recognize the safeguards already in place.

IV. SOLUTIONS

Presently, even without the AAA, there are adequate safeguards that protect the public interest of preserving archaeological resources.[232] Indeed, the Federal Government's ownership of the major-

224. For an argument against this position and advocating for regulations which deprive a finder and landowner rights to found property see, Patty Gerstenblith, *Fifth Annual Tribal Sovereignty Symposium: Protection of Cultural Heritage Found on Land; Paradigm of the Miami Circle and Regulatory Takings Doctrine After Lucas*, 13 ST. THOMAS L. REV. 65 (2000).

225. Richard A. Epstein, *Introduction* of RICHARD A. EPSTEIN, LIBERTY, PROPERTY AND THE LAW, A COLLECTION OF ESSAYS, at xiii (2000).

226. *See supra* Part II(B).

227. *See supra* text accompanying notes 124-25.

228. ALA. CODE § 35-12-5 (2000).

229. ALA. CODE § 35-12-1 to 3.

230. ALA. CODE § 35-12-5.

231. *See* Epstein, *supra* note 231225, at xiii.

232. *See supra* Part II(A).

ity of archaeologically significant land[233] and conventional state criminal statutes[234] are sufficient to prevent looting. Even if states are compelled to regulate private property rights, a model uniform statute has been suggested.[235] These solutions serve the state interests of protecting the majority of archaeological resources and simultaneously protecting individuals and their traditional expectations of property ownership.[236]

State intrusion onto private property rights is unnecessary as the Federal Government and states own over thirty nine percent of the land in the United States.[237] This is particularly compelling since the land the Federal Government manages is primarily in the Western part of the country where a large proportion of archaeological resources are found.[238] Accordingly, sovereign ownership of antiquities on land owned by the sovereign is effective in preserving our cultural past and makes sense in light of the common law tradition of property ownership.

In the Federal realm, there are pervasive regulations in place to protect archaeological resources.[239] Some of those protections include the Native American Graves Repatriation Act,[240] the National Historic Preservation Act,[241] and ARPA.[242] ARPA's scope is particularly broad as it not only prohibits excavation of "any material remains of past

233. *See* Patty Gerstenblith, *Fifth Annual Tribal Sovereignty Symposium: Protection of Cultural Heritage Found on Private Land: The Paradigm of the Miami Circle and Regulatory Takings Doctrine After Lucas*, 13 ST. THOMAS L. REV. 65, 78-79 (2000) citing: U.S. General Accounting Office, *Cultural Resources: Problems Protecting and Preserving Federal Archaeological Resources* (1987); *Federal Lands: Information on Land Owned and on Acreage with Conservation Restrictions* (1995).

234. *See* ALA. CODE §§ 13A-7-2 to 13A-7-4 (2000).

235. *See Fifth Annual Tribal Sovereignty Symposium*, *supra* note 233, at 106-08 (advocating Model Statute based on public opinion). While this would provide better notice and uniform enforcement, this Note would reject a proposal that follows public opinion when infringing on an individual's property rights.

236. *See infra* text accompanying notes 248-55.

237. National Wilderness Institute, *State by State Government Land Ownership* (1995), *at* http://www.nwi.org/Maps/LandChart.html (last visited Apr. 21, 2002).

238. *See Fifth Annual Tribal Sovereignty Symposium*, *supra* note 233, at 78-79 (citing: U.S. General Accounting Office, *Cultural Resources: Problems Protecting and Preserving Federal Archaeological Resources* (1987)); *Federal Lands: Information on Land Owned and on Acreage with Conservation Restrictions* (1995).

239. *See infra* notes 240-42.

240. 25 U.S.C. §§ 30001-13 (1992).

241. 25 U.S.C. §§ 3002(c)(2) (1992).

242. 16 U.S.C. §§ 4070aa-470mm (1940).

human life which are of material interest" on federal lands, but it also prohibits the interstate trafficking of such artifacts regardless of whether they were found on private or public land.[243] The Court of Appeals of the Seventh Circuit in *United States v. Gerber*,[244] held that the defendant could be prosecuted under ARPA because the defendant had trespassed on private property and removed artifacts and therefore violated a state law whose purpose was to deter such behavior.[245] Clearly, with protections already in place it is unnecessary to overly burden private property with costly restrictions.

As previously illustrated, trespassing and conversion laws in conjunction with ARPA deter and punish looters and grave robbers who enter private property without the owner's permission.[246] As a result of ARPA, hobbyists, such as those who use metal detectors to unearth small artifacts, find it in their own best interest to obtain permission of the landowners before exploring the land.[247]

Lastly, state legislators could adopt a Uniform Model Code[248] that either ensures just compensation for artifacts of cultural significance or imposes permit requirements on state owned or controlled land.[249] Alternatively, Georgia's permit requirement provides protection to culturally significant artifacts on state lands.[250] Georgia requires anyone who wishes to metal detect or conduct archaeological research on state land to obtain a permit from the state archaeologist.[251] In addition, all items of archaeological significance found on state land are property

243. United States v. Gerber, 999 F.2d 1112, 1115 (7th Cir. 1993) (holding that since defendant had trespassed on private property and stolen the artifacts and was thus in violation of state law, he could be prosecuted under ARPA).

244. *Id.* at 1112.

245. *Id.* at 1116.

246. *See id.*

247. *See* FEDORY, *supra* note 205, at 29.

248. *See Fifth Annual Tribal Sovereignty Symposium*, *supra* note 233, at 106-09.

249. *See* GA. CODE ANN. § 12-3-52(c) (2001). The statute also "urges" individuals metal detecting on private land to comply with the permit requirement. However, the Georgia Council of Professional Archaeologists misreads the statute and promulgates that you must notify the Georgia Department of Natural Resources if you wish to look for artifacts on private land. This is not true. Georgia Council of Professional Archaeologists, *Frequently Asked Questions* (Nov. 20, 2000), *at* http://www.georgia-archaeology.org/gcpa/faq.html (last visited May 13, 2002).

250. *See* GA. CODE ANN. § 12-3-52(c) (2001).

251. *Id.*

of the state and must be used for scientific or educational purposes.[252] Anyone who fails to comply with the permit scheme or intentionally "defaces, injures, destroys, displaces, or removes an object" of historical value is guilty of a misdemeanor.[253] However, the Georgia statute recognizes that this statute does not apply to private land, and thus only "urges" that private landowners comply as the permit require.[254] Accordingly, states may adequately protect their interests in artifacts while still recognizing traditional American property expectations.[255]

V. CONCLUSION

The right to property protection is a right that many Americans view as a symbol that acts as a barrier between individual rights and legitimate government power.[256] However, even in light of the historical diminution of property rights, the present constitutional doctrine recognizes that individuals should be compensated when the state completely deprives an individual of their rightly acquired property.[257] Eric from the hypothetical who found a Civil War-era watch should be able to exhibit it to his friends and tell them where he found it without fearing that Alabama may decide that the watch Eric found on his land actually belongs to the state. At the very least, if the people of the State of Alabama feel compelled to take Eric's property in the name of archaeological preservation, they should be prepared to pay for it.

Charles R. Walsh, Jr.

252. *Id.*; *see also* ARK CODE ANN. §13-6-301 (Michie 2001) (Reserving ownership to artifacts found on state lands but only encouraging individuals on private land to consult with the state archaeologist).

253. GA. CODE ANN. § 12-3-54.

254. GA. CODE ANN. §13-3-52(c);

255. *See supra* Part II(A).

256. *See* NEDELSKY, *supra* note 90, at 246-50; *see also* BERNARD H. SIEGAN, PROPERTY RIGHTS, FROM MAGNA CARTA TO THE 14TH AMENDMENT.

257. *See supra* text accompanying notes 88-137.